

United States District Court
For the Northern District of California

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IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

SLEEP SCIENCE PARTNERS,
Plaintiff,
v.
AVERY LIEBERMAN; SLEEPING WELL, LLC;
and DOES 1-10,
Defendants.

No. C 09-04200 CW
ORDER DENYING
DEFENDANT'S MOTION
TO DISMISS

Defendant Sleeping Well moves to dismiss Plaintiff Sleep Science Partners' claims for lack of personal jurisdiction.¹ Plaintiff opposes the motion. The Court heard the motion on November 12, 2009. Having considered oral argument and all of the papers submitted by the parties, the Court denies Defendant Sleeping Well's motion to dismiss.

BACKGROUND

Plaintiff is a California-based business which manufactures, markets and sells an anti-snoring prescription mandibular repositioning device (MRD) called PureSleep. An MRD is an FDA

¹ Defendant Lieberman is a California resident and did not join in this motion. However, he is also represented by Sleeping Well's attorney who represents that Lieberman will consent to personal jurisdiction in the District of Vermont so that this litigation can proceed efficiently in a single proceeding.

1 regulated medical device which may only be obtained by prescription
2 from a medical doctor or dentist. In 2005, Plaintiff's founders
3 developed a business model, the PureSleep Method, which allows
4 consumers to purchase a PureSleep device without visiting a
5 dentist. Plaintiff implemented and marketed the PureSleep device
6 through the PureSleep Method which consists of, among other things,
7 a screening questionnaire, website, phone ordering system, and
8 television commercials. In early 2006, Plaintiff entered into
9 discussions with Defendant Avery Lieberman, a California-based
10 dentist, to see if Lieberman would prescribe the PureSleep device
11 using the PureSleep Method. As a condition of discussing the
12 PureSleep Method, Plaintiff required Lieberman to sign a Non-
13 disclosure Agreement. At the time of these discussions, Plaintiff
14 had not yet publicly displayed the PureSleep Method. Lieberman
15 helped Plaintiff refine the PureSleep Method until May, 2007, when
16 he ceased all communication with Plaintiff. Plaintiff launched its
17 website and PureSleep Method in November, 2007.

18 Plaintiff alleges that Lieberman contacted Daniel and Katrine
19 Webster, Vermont residents, and told them how to use the PureSleep
20 Method to sell MRDs. Plaintiff claims that the Websters ordered an
21 MRD from its website in order to test the functionality of the
22 PureSleep device and copy the website's look and feel. Plaintiff's
23 website requires that anyone who orders a product must signify that
24 he or she has read and agrees to be bound to Plaintiff's "Terms and
25 Conditions" which state, in part, "No part of this website may be
26 reproduced or transmitted." Pl's Complaint, Ex 1.

27 On August 4, 2008, Daniel and Katrine registered the domain
28 name "ZQuiet.com" and, in September, 2008, registered Defendant

1 Sleeping Well as a limited liability company with the Secretary of
2 State of Vermont. Sleeping Well entered into a contract with Euro
3 RSCG Edge (EURO), a California-based media buying company, to
4 purchase television advertising air time. EURO has always been and
5 is Plaintiff's exclusive television media buyer. Plaintiff spent
6 over a year with EURO testing different television stations and air
7 times to find the most profitable way to market PureSleep. Lindsay
8 Dec. at 21.

9 In April, 2009, Sleeping Well launched its television
10 commercials, website, and ordering system site. Plaintiff alleges
11 that Sleeping Well misappropriated its PureSleep Method through
12 Lieberman and that its website has the same format, design, and
13 feel of Plaintiff's website. Plaintiff also claims that Sleeping
14 Well directed EURO to target the same television stations and air
15 times that it uses to advertise PureSleep.

16 In September, 2009, Plaintiff filed a suit against Lieberman
17 and Sleeping Well in federal court, alleging copyright and trade
18 dress infringement, misappropriation of trade secrets, breach of
19 contract, breach of the implied covenant of good faith and fair
20 dealing, tortious interference, false advertising, unfair
21 competition and civil conspiracy.

22 LEGAL STANDARD

23 Under Rule 12(b)(2) of the Federal Rules of Civil Procedure, a
24 defendant may move to dismiss for lack of personal jurisdiction.
25 The plaintiff then bears the burden of demonstrating that the court
26 has jurisdiction. Schwarzenegger v. Fred Martin Motor Co., 374
27 F.3d 797, 800 (9th Cir. 2004). The plaintiff "need only
28 demonstrate facts that if true would support jurisdiction over the

1 defendant." Ballard v. Savage, 65 F.3d 1495, 1498 (9th Cir. 1995).
2 Uncontroverted allegations in the complaint must be taken as true.
3 AT&T v. Compagnie Bruxelles Lambert, 94 F.3d 586, 588 (9th Cir.
4 1996). However, the court may not assume the truth of such
5 allegations if they are contradicted by affidavit. Data Disc, Inc.
6 v. Systems Technology Assocs., Inc., 557 F.2d 1280, 1284 (9th Cir.
7 1977). If the plaintiff also submits admissible evidence,
8 conflicts in the evidence must be resolved in the plaintiff's
9 favor. AT&T, 94 F.3d at 588.

10 There are two independent limitations on a court's power to
11 exercise personal jurisdiction over a non-resident defendant: the
12 applicable state personal jurisdiction rule and constitutional
13 principles of due process. Sher v. Johnson, 911 F.2d 1357, 1361
14 (9th Cir. 1990); Data Disc, Inc., 557 F.2d at 1286. California's
15 jurisdictional statute is co-extensive with federal due process
16 requirements; therefore, jurisdictional inquiries under state law
17 and federal due process standards merge into one analysis. Rano v.
18 Sipa Press, Inc., 987 F.2d 580, 587 (9th Cir. 1993).

19 The exercise of jurisdiction over a non-resident defendant
20 violates the protections created by the due process clause unless
21 the defendant has "minimum contacts" with the forum state so that
22 the exercise of jurisdiction "does not offend traditional notions
23 of fair play and substantial justice." International Shoe Co. v.
24 Washington, 326 U.S. 310, 316 (1945).

25 DISCUSSION

26 Personal jurisdiction may be either general or specific.
27 Plaintiff concedes that Sleeping Well is not subject to general
28 jurisdiction, but argues that it is subject to specific

1 jurisdiction. Specific jurisdiction exists when the cause of
2 action arises out of or relates to the defendant's activities
3 within the forum. Data Disc, Inc., 557 F.2d at 1286. Specific
4 jurisdiction is analyzed using a three-prong test: (1) the non-
5 resident defendant must purposefully direct its activities towards,
6 or consummate some transaction with, the forum or a resident
7 thereof, or perform some act by which it purposefully avails itself
8 of the privilege of conducting activities in the forum, thereby
9 invoking the benefits and protections of its laws; (2) the claim
10 must be one which arises out of or results from the defendant's
11 forum-related activities; and (3) the exercise of jurisdiction must
12 be reasonable. Lake v. Lake, 817 F.2d 1416, 1421 (9th Cir. 1987).
13 Each of these conditions is required for asserting jurisdiction.
14 Insurance Co. of N. Am. v. Marina Salina Cruz, 649 F.2d 1266, 1270
15 (9th Cir. 1981).

16 I. Purposefully Directed and Purposefully Availed

17 A showing that a defendant "purposefully directed" its conduct
18 toward a forum state generally is used in tort cases, while a
19 showing that a defendant "purposefully availed" itself of the
20 privilege of doing business in a forum state is generally used in
21 contract cases. Schwarzenegger, 374 F.3d at 802. Because
22 Plaintiff alleges both tort and contract claims against Sleeping
23 Well, the Court will look at both standards.

24 A. Purposefully Directed

25 A showing that a defendant "purposefully directed" its conduct
26 toward a forum state "usually consists of evidence of the
27 defendant's actions outside the forum state that are directed at
28 the forum, such as the distribution in the forum state of goods

1 originating elsewhere." Id. at 803. Purposeful direction may be
2 established under the "effects test" where the defendant
3 (1) committed an intentional act, (2) expressly aimed at the forum
4 state, (3) causing harm that the defendant knows is likely to be
5 suffered in the forum state. Dole Food Co. v. Watts, 303 F.3d
6 1104, 1111 (9th Cir. 2002).

7 Sleeping Well's actions, as alleged by Plaintiff, satisfy the
8 "effects test." Sleeping Well intentionally obtained Plaintiff's
9 trade secrets from Lieberman, a California resident, intentionally
10 copied Plaintiff's trade dress and business methods, and
11 intentionally advertised and sold products in California in direct
12 competition with Plaintiff. Sleeping Well also entered into a
13 contractual relationship with EURO, a California based media buying
14 company which is also Plaintiff's television media buyer, in order
15 to purchase television advertising airtime. Plaintiff alleges that
16 Sleeping Well instructed EURO to target the same television
17 stations and air times that Plaintiff successfully uses to
18 advertise PureSleep. By allegedly misappropriating trade secrets
19 from Lieberman and infringing on Plaintiff's trade dress and
20 copyright, Sleeping Well expressly targeted Plaintiff's business in
21 California and caused foreseeable harm to it in California.

22 Sleeping Well argues that it never committed any acts in
23 California to obtain or copy Plaintiff's proprietary information,
24 and therefore cannot be said to have purposefully directed its
25 activities toward California. However, the effects test does not
26 require that the intentional act be committed in the forum, only
27 that the wrongful conduct individually target a known forum
28 resident. Bancroft & Masters, Inc. v. Augusta Nat. Inc., 223 F.3d

1 1082, 1087 (9th Cir. 2000); see Brainerd v. Governors of the Univ.
2 of Alberta, 873 F.2d 1257, 1259-60 (9th Cir. 1989) (holding that an
3 Arizona court had specific jurisdiction over Canadian residents
4 who, in response to telephone calls directed at them in Canada,
5 made defamatory statements about a person they knew resided in
6 Arizona). Even though Sleeping Well may have been in another forum
7 when it misappropriated Plaintiff's trade secrets and infringed
8 Plaintiff's trade dress and copyright, its acts targeted
9 Plaintiff's proprietary information and business which is based in
10 California.

11 Sleeping Well also argues that Plaintiff's alleged economic
12 harm in California is not sufficient to satisfy the third prong of
13 the effects test because Plaintiff sells its products nation-wide
14 and, thus, its business is not centered in California. Relying on
15 Panavision Int'l L.P. v. Toeppen, et al, 141 F.3d 1316, 1322 (9th
16 Cir. 1998), Sleeping Well continues that whether the alleged harm
17 is felt within the forum is not determined by where Plaintiff's
18 business is physically located, but where Plaintiff's business is
19 centered. It avers that the forum state must be where the "brunt
20 of the harm" is felt, citing Core-Vent Corp., v. Nobel Industries
21 AB, 11 F.3d 1482, 1486 (9th Cir. 1993). In Panavision, the
22 defendant registered a website domain name using the trademark of
23 Panavision, a California based corporation that manufactured and
24 sold motion picture camera equipment. 141 F.3d at 1319. The Ninth
25 Circuit held that the effects test was satisfied because the
26 defendant's conduct "had the effect of injuring Panavision in
27 California where Panavision has its principal place of business and
28 where the movie and television industry is centered." Id. at 1322.

1 Thus, Sleeping Well argues, the effects test would be satisfied
2 only if Plaintiff's business were centered in California.

3 Sleeping Well is incorrect. After Core-Vent and Panavision,
4 the Ninth Circuit clarified that the "brunt" of the harm need not
5 be suffered in the forum state. Yahoo! Inc. v. La Lique Contre Le
6 Racisme, 433 F.3d 1199, 1207 (9th Cir. 2006). Instead, the Ninth
7 Circuit held that as long as a "jurisdictionally sufficient amount
8 of harm is suffered in the forum state, it does not matter that
9 even more harm might have been suffered in another state." Id.;
10 see also Keeton v. Hustler Magazine, Inc., 465 U.S. 770, 785 (1984)
11 (sustaining exercise of personal jurisdiction in New Hampshire even
12 though "[i]t is undoubtedly true that the bulk of the harm done to
13 petitioner occurred outside New Hampshire.") Plaintiff has
14 suffered harm in California that is sufficient to satisfy the third
15 prong of the effects test.

16 B. Purposefully Availed

17 A showing that a defendant "purposefully availed" itself of
18 the privilege of doing business in a forum state typically consists
19 of evidence of the defendant's actions in the forum.
20 Schwarzenegger, 374 F.3d at 802. The requirement of purposeful
21 availment ensures that the defendant should reasonably anticipate
22 being haled into court in the forum state based on its contacts
23 there. World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286, 297
24 (1980). The purposeful availment test is met if "the defendant has
25 taken deliberate action within the forum state or if he has created
26 continuing obligations to forum residents." Ballard, 65 F.3d at
27 1498.

28 Sleeping Well has purposefully availed itself of doing

1 business in California. In addition to marketing and shipping its
2 products to California, Sleeping Well also maintains a continuous
3 business relationship with Lieberman, its business consultant, who
4 is featured on its website, "Zquiet.com." Sleeping Well also has a
5 business relationship with EURO, a media buyer, and maintains an
6 account with a California bank. Sleeping Well's maintenance of
7 these relationships invokes the benefits and protections of
8 California's laws.

9 Sleeping Well argues that merely operating a website that
10 sells products to California consumers does not amount to
11 purposeful availment because it markets its product to the nation
12 as a whole and does not specifically target California. Sleeping
13 Well relies on Pavlovich v. Superior Court, 29 Cal. 4th 262, 274-75
14 (2002), to argue that creating a website, like placing a product in
15 a stream of commerce, is not an act directed toward the forum state
16 because, if it were, personal jurisdiction could be found in any
17 forum in the country. However, the court in Pavlovich was
18 discussing a "passive" website on which the defendant merely posted
19 information. The Ninth Circuit has held that "the likelihood that
20 personal jurisdiction can be constitutionally exercised is directly
21 proportionate to the nature and quality of commercial activity that
22 an entity conducts over the Internet." Cybersell, Inc. v.
23 Cybersell, Inc. 130 F.3d 414, 419 (9th Cir. 1997).² Here, Sleeping
24 Well maintains an interactive website that allows people to fill

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26 ² Sleeping Well cites Graduate Mgmt. Admission Council v. RVR
27 Narasimha Raju d/b/a "GMATPlus.com", 241 F.Supp. 2d 589, 594 (E.D.
28 Va 2003). Although Graduate has similar facts and a different
result than Cybersell, Inc., it is not controlling. This Court
must follow the Ninth Circuit standard set forth in Cybersell,
Inc..

1 out a prescription survey and purchase its products online. Under
2 Cybersell, Inc.'s sliding scale test, Sleeping Well's commercial
3 activity satisfies the "purposeful availment" requirement.

4 II. Claim Arises Out of Defendant's Forum-Related Activities

5 The second factor for specific jurisdiction requires that the
6 claim arise out of or result from the defendant's forum-related
7 activities. This factor is met if the claim would not have arisen
8 "but for" the defendant's forum-related contacts. Panavision, 141
9 F.3d at 1322.

10 Plaintiff's claims arise out of Sleeping Well's contacts with
11 the forum. But for Sleeping Well's relationship with Lieberman,
12 Sleeping Well would not have obtained Plaintiff's proprietary
13 business methods and trade secrets. But for Sleeping Well's
14 contacts with EURO, its television advertisements would not have
15 directly competed with Plaintiff's, and Plaintiff would not have
16 been harmed by consumer confusion and reduced sales. But for
17 Sleeping Well's marketing and selling its products to California
18 consumers through its allegedly infringing website, Plaintiff would
19 not have suffered a loss of sales in California.

20 III. Specific Jurisdiction is Reasonable

21 Once the plaintiff has satisfied the first two factors, the
22 defendant bears the burden of overcoming a presumption that
23 jurisdiction is reasonable by presenting a compelling case that
24 specific jurisdiction would be unreasonable. Burger King Corp. v.
25 Rudzewicz, 471 U.S. 462, 477 (1985); Haisten v. Grass Valley
26 Medical Fund, Ltd., 784 F.2d 1392, 1397 (9th Cir. 1986). Seven
27 factors are considered in assessing whether the exercise of
28 jurisdiction over a non-resident defendant is reasonable: (1) the

1 extent of the defendant's purposeful interjection into the forum
2 state's affairs, (2) the burden on the defendant of defending in
3 the forum, (3) conflicts of law between the forum state and the
4 defendant's home jurisdiction, (4) the forum state's interest in
5 adjudicating the dispute, (5) the most efficient judicial
6 resolution of the dispute, (6) the plaintiff's interest in
7 convenient and effective relief, and (7) the existence of an
8 alternative forum. Caruth v. Int'l Psychoanalytical Ass'n, 59 F.3d
9 126, 128 (9th Cir. 1995).

10 A. Purposeful Interjection

11 "Even if there is sufficient interjection into the state to
12 satisfy the purposeful availment prong, the degree of interjection
13 is a factor to be weighed in assessing the overall reasonableness
14 of jurisdiction under the reasonableness prong." Core-Vent, 11
15 F.3d at 1488 (internal quotations and citations omitted). In
16 Panavision, the Ninth Circuit found that the purposeful
17 interjection factor weighed strongly in the plaintiff's favor based
18 on the fact that the defendant acted "knowing that" its
19 registration of the plaintiff's domain name "would likely injure"
20 the plaintiff who was located in California. Panavision, 141 F.3d
21 at 1323. Similarly, according to the allegations, Sleeping Well
22 knew through its contacts with Lieberman and EURO that, by
23 misappropriating Plaintiff's trade secrets, infringing on its
24 copyright and selling competing goods to California consumers, it
25 would likely injure Plaintiff who is located in California. Thus,
26 Plaintiff satisfies the purposeful interjection prong, which weighs
27 in favor of the Court's personal jurisdiction.

28

1 B. Defendant's Burden in Litigating

2 A defendant's burden in litigating in the forum is a factor in
3 the assessment of reasonableness, but unless the "inconvenience is
4 so great as to constitute a deprivation of due process, it will not
5 overcome clear justifications for the exercise of jurisdiction."
6 Caruth, 59 F.3d at 128-29 (citing Roth v. Garcia Marquez, 942 F.2d
7 617, 623 (9th Cir. 1991)).

8 The burden on Sleeping Well, a small Vermont business, is
9 significant, but the inconvenience is not so great as to deprive
10 Sleeping Well of due process. See Panavision, 141 F.3d at 1323
11 (finding an Illinois defendant's burden in litigating in California
12 significant, but not unreasonable). Because of modern technology
13 such as fax machines, email and video phone, requiring Sleeping
14 Well to litigate in California is not constitutionally
15 unreasonable. Id.; Dole Foods, 303 F.3d at 1115.

16 C. Sovereignty

17 This factor concerns the extent to which the district court's
18 exercise of jurisdiction in California would conflict with the
19 sovereignty of Vermont, Sleeping Well's domicile. Core-Vent, 11
20 F.3d at 1489. Sleeping Well concedes that there would be no
21 conflict if the Court exercised jurisdiction.

22 D. Forum State's Interest

23 "California maintains a strong interest in providing an
24 effective means of redress for its residents tortiously injured."
25 Gordy v. Daily News, L.P., 95 F.3d 829, 836 (9th Cir. 1996) (citing
26 Sinatra v. National Enquirer, Inc., 854 F.2d 1191, 1200 (9th Cir.
27 1988)). Sleeping Well concedes that this factor weighs in
28 Plaintiff's favor.

1 E. Efficient Resolution

2 This factor focuses on the location of the evidence and
3 witnesses. Caruth, 59 F.3d at 129. It is no longer weighed
4 heavily given the modern advances in communication and
5 transportation. Id.; Panavision, 141 F.3d at 1323. Both Sleeping
6 Well and Plaintiff indicate they have witnesses and evidence in
7 their respective forums. Because neither party presents a
8 stronger case, this factor is neutral.

9 F. Convenience to Plaintiff

10 "In evaluating the convenience and effectiveness of relief for
11 the plaintiff, we have given little weight to the plaintiff's
12 inconvenience." Panavision, 141 F.3d at 1324; Ziegler v. Indian
13 River County, 64 F.3d 470, 476 (9th Cir. 1995). It may be somewhat
14 more costly and inconvenient for Plaintiff to litigate in another
15 forum but, as discussed above, modern advances in communications
16 and transportation make the burden on Plaintiff relatively slight.
17 This factor is essentially neutral, weighing only slightly in
18 Plaintiff's favor.

19 G. Alternative Forum

20 In this case, Vermont is an alternative forum. As stated
21 above, it may be more costly and inconvenient for Plaintiff to
22 litigate in Vermont, but this is not an unreasonable burden. This
23 factor weighs in Sleeping Well's favor.

24 H. Balancing the Reasonableness Factors

25 Although some factors weigh in Sleeping Well's favor, it fails
26 to present a compelling case that this Court's exercise of
27 jurisdiction in California would be unreasonable. Because all of
28 the requirements for specific jurisdiction are satisfied, the Court

1 exercises personal jurisdiction over Sleeping Well.

2 CONCLUSION

3 For the foregoing reasons, the Court denies Sleeping Well's
4 motion to dismiss for lack of personal jurisdiction.

5 IT IS SO ORDERED.

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7 Dated: 11/23/09



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CLAUDIA WILKEN
United States District Judge

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